IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRLEY SWOOPE et al. PLAINTIFFS

. Civil Action No. 1:97cv181-D-D

BELLSOUTH TELECOMMUNICATIONS, INC., et al. DEFENDANTS

CONSOLIDATED WITH

RITA D. ALLISON et al. PLAINTIFFS

v. Civil Action No. 1:97cv359-D-D

BELLSOUTH TELECOMMUNICATIONS, INC. DEFENDANT

MEMORANDUM OPINION

Presently before the court is the plaintiffs' motion for class certification. For the reasons set forth below, the court shall deny it.

. Factual and Procedural Background

The named plaintiffs in this action are nineteen former employees of the defendant BellSouth Telecommunications, Inc. (BellSouth). Until the summer of 1997, all nineteen plaintiffs worked in BellSouth's Outside Plant Engineering Group. The Outside Plant Engineering Group consisted of hundreds of design engineers who produced construction drawings for poles, equipment boxes, wires, cables and other telephone components. In 1997, BellSouth implemented an outsourcing plan which it termed the "Competitive Sourcing Transition Assistance Plan" (CSTAP). Under CSTAP, BellSouth outsourced its outside plant engineering work to three contractors. The contractors were the defendants BE&K, Inc., Parsons Infrastructure & Technology Group, Inc., and Fluor Daniel, Inc. (the Contractors). In conjunction with CSTAP, BellSouth terminated the employment of 428 members of the Outside Plant Engineering Group. The parties refer to these 428 individuals as the "Specialists." BellSouth offered each Specialist a severance package in exchange for a release of all potential

claims against BellSouth.[1] A total of 404 of the Specialists accepted severance packages and signed releases. None of the nineteen plaintiffs signed a release.

In the present action, the plaintiffs assert that in implementing CSTAP the defendants violated (1) the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA); (2) the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA); and (3) state common law. In the motion the court addresses today, the plaintiffs seek the certification of a class action against the following class and subclasses:

> A. Pursuant to F.R.C.P. 23 and as to the ERISA claims, Plaintiffs seek class certification against BellSouth on behalf of an ERISA class of all BellSouth "specialists" who were subject to [CSTAP] in the states of Mississippi, Alabama, Louisiana, Georgia, Florida, North Carolina, South Carolina, Kentucky, and Tennessee ("BellSouth Region").
> B. Pursuant to 29 U.S.C. § 216(b) and as to the ADEA claims, Plaintiffs seek class certification against BellSouth on behalf of an ADEA subclass of all BellSouth "specialists" age 40 or older who were subject to CSTAP in the BellSouth Region.
> C. Plaintiffs also seek three subclasses to be certified separately against BE&K, Fluor, and Parsons in the states where each company has participated with BellSouth in CSTAP.

Amended Motion for Class Certification, pp. 1, 2. On June 8, 1998, the court held an evidentiary hearing regarding the issue of class certification. Now the court has reviewed the evidence gathered at the hearing, as well as the submissions of the parties on this matter, and is prepared to rule.

II. Discussion

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[1]Entitled the "BellSouth Telecommunications, Inc. Competitive Sourcing Transition Assistance Plan (BST CSTAP) Election and Release," the release provided that the signer

> fully waive, discharge and release any and all claims of whatever nature, known or unknown, [the signer] may have against BellSouth Telecommunications, Inc., its parent, subsidiaries, affiliated and related companies . . . as a result of actions or omissions occurring through this date. Specifically included in this waiver and release are any and all claims of alleged employment discrimination, either as a result of my separation of employment from the Company or otherwise, under the Age Discrimination in Employment Act of 1967, . . . and any and all claims under any other federal, state or local statutory or common law or regulation, including the Employee Retirement Income Security Act of 1974 . . . .

BellSouth's Brief in Opposition to Plaintiffs' Amended Motion for Class Certification, unnumbered attachment to Exhibit "A."

The plaintiffs only seek certification regarding their federal claims under ERISA and ADEA. The plaintiffs do not seek certification regarding their state law claims. Accordingly, the court shall address class certification under each federal act. The standard facing the plaintiffs regarding the proposed ERISA class is contained in Rule 23 of the Federal Rules of Civil Procedure. The standard facing the plaintiffs regarding the proposed ADEA class is contained in § 216(b) of the Fair Labor Standards Act (FLSA).

. The ERISA Class

Under Rule 23, a plaintiff seeking class certification must satisfy the four prerequisites contained in subsection "a" and then show that the action falls under at least one of the three categories of class actions described in subsection "b." E.g., Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996). The four prerequisites are the following:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Routinely courts refer to the prerequisites as numerosity, commonality, typicality and adequacy. If a plaintiff fails to meet any one of the prerequisites, then the court must deny certification.

Here, the plaintiffs fail to establish at least one of the prerequisites: typicality. The court acknowledges that the test for typicality is not demanding. Lightbourn v. El Paso, 118 F.3d 421, 426 (5th Cir. 1997) (citing Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993)). "Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." Id. (citing Flanagan v. Ahearn (In re Asbestos Litig.), 90 F.3d 963, 976 (5th Cir.1996)). "There is some doubt as to the exact meaning of the 'typicality' requirement." 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1764 (2d ed. 1986). Certainly, though, the typicality requirement does not require that the claims of the class members be identical. E.g., Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985); see also Lightbourn, 118 F.3d at 426

("In the event the class members in this case were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs.").

Here, the "claims or defenses" of the named plaintiffs are not typical of the "claims or defenses" of the class. See Fed. R. Civ. P. 23(a)(3). This is because none of the named plaintiffs signed a release of his or her claims against BellSouth, whereas most of the rest of the proposed class members did sign releases. As a result, while most members of the class will probably have to litigate the validity of the releases, the named plaintiffs will not have to do so. Therefore, the plaintiffs fail to satisfy the typicality prerequisite.

In reaching this conclusion, the court finds persuasive the opinions of other courts which refused certification under similar circumstances. In one case, for example, a plaintiff sought certification of a class action against his former employer for violations of Title VII of the Civil Rights Act of 1964. Muller v. Curtis Publ'g Corp., 57 F.R.D. 532, 534 (E.D. Penn. 1973). Except for the lone named plaintiff, all of the members of the purported class had signed releases of claims against the defendant. Muller, 57 F.R.D. at 534. Refusing to certify a class action, the district court explained,

> [The plaintiff's] claim is not typical of the claims of the members of the alleged class. His claim is unique in that he is the only member of the alleged class who has not accepted the benefits of settlements arrived at between [the defendant] and its employees . . ., and who has not given a release to [the defendant] in one form or another.

Id. at 535. In Melong v. Micronesian Claims Commission, the United States Court of Appeals for the District of Columbia Circuit also addressed similar facts and reasoned as follows:

> The first question that we must resolve, therefore, is whether those proposed class members who have executed releases with the [defendant] may be included within the plaintiffs' proposed class.
>
> This issue is not a novel one; it has been addressed often by courts in a variety of cases involving proposed class actions. In each instance, the court considering the question has concluded that proposed class members who have executed releases can not be represented by individuals who have not executed a release. We agree with this principle and, in the instant cases, hold that those claimants who have previously executed releases may not be included within [the plaintiffs'] proposed classes.

Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 13 (D.C. Cir. 1980) (citations omitted); see also Ciarlanta v. Brown & Williamson Tobacco Corp., Civ. A. No. 95-4646, 1995 WL 764579, at *2 (E.D. Pa. Dec. 18, 1995) (refusing to allow former employee who signed release to intervene in purported class action brought by named plaintiffs who had not signed releases; further, excluding signers of releases from class); Thonen v. McNeil-Akron, Inc., 661 F. Supp. 1271, 1274 (N.D. Ohio 1986) (addressing typicality, refusing to allow two plaintiffs who did not sign accord and satisfaction agreements to be representative plaintiffs in class action consisting only of persons who did sign such agreements); cf. Killian v. McCulloch, 873 F. Supp. 938 (E.D. Pa. 1995) (regarding opposite situation where named plaintiff, not remaining class members, signed release).

The plaintiffs contend that "[t]ypicality can be satisfied even when there may be differences in defenses between the class representatives and the class members." Plaintiff's Memorandum of Law in Support of Motion and Amended Motion for Class Certification, p. 12. However, the two cases which the plaintiffs cite in support of this contention are readily distinguishable and inapposite here. See Ross v. Bank South, N.A., 837 F.2d 980, 997 (11th Cir. 1988) ("[T]he district court might have been justified in rejecting class certification in this case because of the defendants' assertion of [a defense unique to the named plaintiffs]."); Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984) (reversing district court's ruling "that plaintiffs were not typical of the class because they were more affected by the toilet malfunction than the other passengers"). To be sure, some courts facing circumstances similar to those here have ruled differently, certifying class actions even though most class members had signed releases which the named plaintiffs had not signed. See Korn v. Franchard Corp., 456 F.2d 1206, 1212 (2nd Cir. 1972) (holding that claims of named plaintiff investor who did not sign release "are not atypical of the unreleased investors', or *until the releases are sustained* of the released investors' as well") (emphasis added); Gaspar v. Linvatec Corp., 167 F.R.D. 51, 54, 57 (N.D. Ill. 1996) ("Defendants argue [unsuccessfully] that the fact that all other class members

signed general releases, while [the named plaintiff] did not, defeats typicality;" named plaintiff signed release "under protest"). However, those decisions do not persuade this court that class certification is appropriate here. In Korn, the Second Circuit implied that typicality would be defeated as to signing class members once the releases were deemed valid. In Gaspar, the named plaintiff actually did sign a release, although he did so "under protest." Therefore, regardless of those decisions, this court finds that the defenses of the named plaintiffs in this case are atypical of the defenses of the class. Accordingly, the amended motion for class certification must be denied.

Incidentally, in 1988 the Fifth Circuit facing similar facts reached a result similar to that which this court reaches today, although it based its decision not on Rule 23 but on the doctrine of standing. In Bernard v. Gulf Oil Corporation, six plaintiffs alleging employment discrimination based on race sought class certification. Bernard v. Gulf Oil Corp., 841 F.2d 547, 549 (5th Cir. 1988). When the plaintiffs filed the lawsuit, the defendant had already offered backpay to a number of employees in return for releases of claims of employment discrimination. Bernard, 841 F.2d at 549. A number of employees accepted the backpay offer and signed releases. Id. In the purported class action, the named plaintiffs — none of whom had signed a release — sought to include in the class those individuals who had signed releases. Id. However, the district court refused, holding that the named plaintiffs lacked standing to assert claims on behalf of those individuals. Id. at 550. Affirming, the Fifth Circuit explained,

> The question presented to the district court was whether the named plaintiffs had standing to represent employees who had signed releases. Because the named plaintiffs sought to obtain relief already obtained by employees who accepted backpay and signed releases, the court found that the plaintiffs lacked standing to represent these employees. We find no error in the court's determination.

Id. at 551. Employing the Fifth Circuit's reasoning to the facts at bar, this court finds that the named plaintiffs, none of whom signed a release in favor of the defendants, lack standing to bring a class action on behalf of the employees who did sign such releases. Accordingly, for this reason as well, the plaintiffs' motion for class certification must be denied.

Of course, the existence of the releases may also touch upon other prerequisites of Rule 23. After all, the prerequisites do overlap. E.g. Amchem Products, Inc. v. Windsor, — U.S. —, 117 S. Ct. 2231, 2251 n.20, 138 L. Ed. 2d 689 (1997) ("The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a) . . . .") (citing Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157, n.13, 102 S. Ct. 2364, 2370, n.13, 72 L. Ed. 2d 740 (1982)). Accordingly, this court finds that the releases also defeat the plaintiffs' ability to satisfy the prerequisites of adequacy and commonality. See Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 15 (D.C. Cir. 1980) ("When the purported class representative has not executed a release and need not establish that the release is defective in his individual case, serious questions are raised concerning the typicality of the class representative's claims *and the adequacy of his representative of other class members*.") (emphasis added); Thonen, 661 F. Supp. at 1274 (holding that named plaintiffs who did not sign accord and satisfaction agreements, unlike other class members, "cannot prove *commonality and typicality*") (emphasis added).

In sum, the plaintiffs fail to satisfy the prerequisites for certification of a class action under Rule 23 of the Federal Rules of Civil Procedure. Principally, the plaintiffs fail to meet the typicality prerequisite. Furthermore, for the same reason they fail to show typicality, the plaintiffs also fail to show commonality and adequacy. Accordingly, this court refuses to certify a class action as proposed by the plaintiffs. Having thus ruled, this court need not address the provisions of subsection "b" of Rule 23.

. The ADEA Class

Section 216 of the FLSA provides,

> An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees *similarly situated*.

29 U.S.C. § 216(b) (emphasis added). To date, the Fifth Circuit has specifically refused to define the phrase "similar situated." See Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir.

1995) (refusing to "sanction any particular methodology"); see also LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (regarding Rule 23 class actions and § 216 class actions, stating, "These two types of class actions are mutually exclusive and irreconcilable"). In determining whether to certify an ADEA class here, this court shall employ the reasoning employed above under Rule 23. Accordingly, the court refuses to certify the plaintiffs' proposed ADEA class. For the reasons described above regarding the existence of releases signed by a vast majority of the members of the proposed class, the named plaintiffs and the rest of the class are not similarly situated.

. Validity of Releases

Attempting to remove the typicality obstacle blocking class certification, the plaintiffs argued during the hearing on June 8, 1998, that the releases are invalid. The plaintiffs have directed this court's attention to two decisions which they say support this argument. See Oubre v. Entergy Operations, Inc., -- U.S. --, 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998) ("Since Oubre's release did not comply with the [Older Workers Benefit Protection Act's] stringent safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA claim."); Butcher v. Gerber Products Co., No. 98 Civ. 1819 (RWS), 1998 WL 289869, at *23 (S.D.N.Y. June 2, 1998) ("Failure to comply with the provisions of [29 U.S.C.] § 626(f)(1)(H), requiring detailed information about the ages of those affected by the group termination, renders a purported release invalid as a defense to an ADEA claim."). Of course, if the plaintiffs' argument that the releases are invalid proves correct, then the typicality obstacle may indeed vanish. See Gaspar, 456 F.2d at 1210 (hypothesizing as to larger size of class "if the releases are invalid"). However, the court need not rule on that issue today because, whether or not the releases are invalid, the named plaintiffs have no standing to raise this argument. None of the named plaintiffs signed a release. Therefore, they lack standing to assert that the releases are invalid. See Bernard, 841 F.2d at 551 ("The validity of the releases, however, is not at issue. Their validity can be attacked in a separate suit by employees who signed releases during the

period when the court's order was in force."). In any event, the named plaintiffs have failed to show that the defendants did not comply with the cited provision of the Older Workers Benefit Protection Act. See 29 U.S.C. § 626(f)(1)(H). Therefore, this court refuses to remove for the plaintiffs the typicality obstacle blocking class certification.

. Appeal of Today's Interlocutory Decision

The parties may wish to appeal today's interlocutory decision. The main provision governing such an appeal is 28 U.S.C. § 1292. That statute provides in pertinent part as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). Considering the disparate views of the courts cited above, today's decision involves a controlling question of law as to which there is substantial ground for a difference of opinion. Furthermore, an immediate appeal of today's decision may materially advance the ultimate termination of this litigation. Accordingly, this court finds that the parties may request the permission of the United States Court of Appeals for the Fifth Circuit to appeal today's interlocutory decision.

. Additional Motions

In conjunction with the amended motion for class certification, the plaintiffs have filed a "Motion to Strike Errata Sheets for Depositions of Jane Adams Killian and Donald L. Strohmeyer." Also, the defendants have filed "Formal Objections to Evidence Submitted by Plaintiffs at Hearing on Plaintiffs' Motion for Class Certification." In making today's ruling, the court did not rely upon the submissions to which the parties object. Therefore, the court finds both the defendants' objections and the plaintiffs' motion to strike moot, and the court shall deny

them as such.

III. Conclusion

The court shall deny the plaintiffs' amended motion for class certification principally because the claims or defenses of the named plaintiffs are not typical of the claims or defenses of the proposed class, and because the named plaintiffs and the remaining plaintiffs in the proposed class are not similarly situated. The court invites the parties to seek the permission of the Court of Appeals to file an immediate appeal of this interlocutory decision.

An separate order in accordance with this opinion shall issue this day.

This the ____ day of June 1998.

_____
United States District Judge

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BELLSOUTH TELECOMMUNICATIONS, INC. DEFENDANT

ORDER DENYING AMENDED MOTION FOR CLASS CERTIFICATION,
DENYING MOTION TO STRIKE AS MOOT,
and DISMISSING "FORMAL OBJECTIONS" AS MOOT

Pursuant to a memorandum opinion issued this day, the court finds the plaintiffs' amended motion for class certification not well-taken and shall deny it.

THEREFORE, it is hereby ORDERED that

(1) the plaintiffs' amended motion for class certification is hereby DENIED;

(2) the plaintiffs' "Motion to Strike Errata Sheets for Depositions of Jane Adams Killian and Donald L. Strohmeyer" is hereby DENIED as moot;

(3) the defendants' "Formal Objections to Evidence Submitted by Plaintiffs at Hearing on Plaintiffs' Motion for Class Certification" are hereby DISMISSED as moot; and

(4) the court FINDS that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

SO ORDERED, this the ____ day of June 1998.

_____
United States District Judge